Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Communications Assistance for	)	CC Docket No. 97-213
Law Enforcement Act	)	

COMMENTS OF U S WEST, INC.

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I. INTRODUCTION AND SUMMARY

In a recent Notice of Proposed Rulemaking[1] the Federal Communications Commission ("Commission") begins an inquiry into the implementation of the Communications Assistance for Law Enforcement Act ("CALEA").[2] In the instant proceeding, the Commission has deemed it appropriate to focus on its obligations and responsibilities under CALEA (such as the establishment of certain types of rules)[3] and to forego detailed intervention with other issues that are implicated by ongoing CALEA implementation efforts.

U S WEST, Inc. ("U S WEST") generally supports this approach. CALEA imposes obligations on a number of different entities: telecommunications carriers, manufacturers, law enforcement personnel and the Commission. It is sage to begin the CALEA proceedings and investigation focusing on the "in house" matters for

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[1] In the Matter of: Communications Assistance for Law Enforcement Act, CC Docket No. 97-213, Notice of Proposed Rulemaking, FCC 97-356, rel. Oct. 10, 1997 ("NPRM").

[2] Pub. L. No. 103-414, 108 Stat. 4279 (1994) (codified as amended in Sections of 18 U.S.C. and 47 U.S.C.).

[3] NPRM ¶ 1. And see 47 U.S.C. § 229.

which the Commission bears explicit responsibility. This is particularly true given the ongoing negotiations (and sometime contentions) between the other CALEA-affected parties -- carriers, manufacturers and law enforcement.

However, it would not further the process or the Commission's responsibilities under the statute to fail to address issues which are more immediately impending. For example, the issue of what is or is not "reasonably achievable" under Sections 107 and 109 of CALEA is as salient an issue at this time as the promulgation of internal carrier practices and procedures. It would be best for the Commission to outline the overall regulatory framework for addressing such matters in this proceeding, albeit somewhat in advance of their formal presentation to the Commission by way of a filed petition.

In these comments, U S WEST addresses four primary items and a secondary matter. With respect to the primary items, we argue that

1. The plain language of CALEA exempts providers of information services from its scope, regardless of whether the entities provide information services exclusively or common carrier services.

2. The Commission's proposed rules and regulations regarding internal carrier practices are unduly detailed and not "necessary" (the language of Section 229(b)) to meet either the Commission's obligations under the Telecommunications Act of 1996 ("1996 Act" or "Act") or CALEA. The Commission should adopt a less intrusive rule, tracking the language of Section 229(b), and adopt Guidelines that would constitute a "safe harbor" with respect to carrier policies.

3. Revenues should have no bearing on whether carriers submit their internal practices and procedures to the Commission under Section 229(c). Rather, the material factor with respect to whether such practices or policies need to be submitted should be the substance of the policies as compared with Commission Guidelines. For policies that comport with the Guidelines, an Open Network Architecture ("ONA")-type certification signed by an officer, should be all that is required.

4. Compliance with CALEA is not now "reasonably achievable" and will not be so until manufactured equipment is available industrywide that will meet the capability and capacity requirements of the statute and the Federal Bureau of Investigation ("FBI"). The Commission should not await the filing of a petition to render such declaration.

With respect to the secondary matter, U S WEST addresses the Commission's suggestion that it venture into areas associated with carrier self-reporting of violations of carrier practices and effectuation of unlawful interceptions, as well as the intersection between such self-reporting and vicarious liability. We argue against such proposals. Immediately below, U S WEST provides further information on our positions outlined above.

First, U S WEST demonstrates that CALEA exempts all information services from its mandates, regardless of whether an entity provides only information services or information and common carriers services. Specifically, where telecommunications carriers act as providers of information services (which include enhanced services such as voice mail), they are not subject to CALEA's reach. The fact that such carriers do not provide information services exclusively is immaterial. Furthermore, nothing in the 1996 Act modifies the general information services exemption found in CALEA. Thus, the Commission's suggestion that the information services provided by telecommunications carriers might be subject to CALEA is erroneous as a matter of law.

Second, U S WEST argues that the Commission's proposed rules go far beyond what is "necessary" (the language of Section 229(b)(1)) for the Commission to meet its Section 229(b) obligations with respect to the promulgation of rules for

CALEA implementation. The proposed rules extend beyond reasonable regulatory action and inappropriately intrude into general management obligations. Neither past history, specific CALEA requirements or associated legislative history suggest such an insinuatory regulatory approach is required or desirable.

The Commission should change its approach. It should craft rules that incorporate general "goal-oriented" carrier obligations, similar to the language included in Section 229(b). Beyond that, the Commission can promulgate Guidelines which, if incorporated into or reflected by existing carrier practices and policies, can form the foundation for a streamlined review under Section 229(c).

Third, the Commission's proposal regarding the use of revenues as the differentiator as to which carriers must file practices and policies under Section 229(c) and which might be absolved from such responsibility can be materially improved upon. The Commission should establish a submission model whereby carrier practices/policies that comply with Commission's Guidelines may take advantage of an ONA-type "certification" approach to carrier policy review. Those who do not include such elements would have to submit their entire panoply of policies and practices for Commission review, with an explanation for any deviations. If the explanation is not reasonable, the Commission can require a modification.

U S WEST's proposal better reflects the current facts associated with carrier practices and policies (i.e., larger carriers undoubtedly have policies in place, some of them long-standing), as well as the privacy and regulatory expectations incorporated in Section 229, than does the Commission's proposal. Furthermore,

this approach would undoubtedly keep to a minimum the number of carrier practices/policies that require formal Commission review.

Fourth, U S WEST addresses the issue of "reasonably achievable" and the appropriate standard for making such a determination under Sections 107 and 109 of CALEA. We argue that the determination of the standard is more than a matter of abstract statutory interpretation. As a threshold matter, unless and until carriers know what the FBI's capacity requirements are, the capabilities have been agreed upon, and the technology needed for compliance has been implemented in equipment generally available to carriers in the marketplace, compliance is not "reasonably achievable" under CALEA. While no petition has yet been filed with the Commission seeking a formal determination of whether CALEA compliance is reasonably achievable, it is clear that such compliance is not currently reasonably achievable. The Commission should make such a declaration.

Finally, U S WEST argues that, barring any legislative requirement that carriers engage in self-reporting, the Commission should not require carriers to report violations of their internal practices and policies or the fact of unlawful interceptions. Nor should the Commission attempt to correlate self-reporting activities with matters of vicarious liability. Rather, the Commission should rely on existing carrier and statutory incentives to govern this area. And, it should make explicit that Commission involvement in the area of CALEA implementation should not be deemed to affect self-reporting or vicarious liability in any material manner.

II. CALEA'S REQUIREMENTS DO NOT APPLY TO INFORMATION SERVICES PROVIDED BY TELECOMMUNICATIONS CARRIERS

The Commission seeks comment on "the applicability of CALEA's requirements to information services provided by common carriers."[4] While the Commission correctly observes that entities that "exclusively" provide information services cannot be a "telecommunications carrier" for purposes of CALEA, it erroneously suggests that "telecommunications carriers" who provide information services as well as other services might be subject to CALEA's obligations.[5]

The Commission's suggestion is incorrect as a matter of simple statutory construction. The statutory language does not include the term "exclusively." The use of the word, thus, sets the Commission out on the wrong interpretive path.

The plain terms of CALEA unequivocally provide that its requirements do not apply to any information services offered by telecommunications carriers, including common carriers. Furthermore, the term "information services" as used in CALEA clearly encompasses all services that are "information services" for purposes of the 1996 Act. As a result, the term as used in CALEA necessarily includes all services that previously fell within the Commission's definition of "enhanced services." The Commission should clarify these principles and should affirm that voice mail services provided by telecommunications carriers -- enhanced services specifically referenced in the NPRM[6] -- are not covered by CALEA.

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[4] NPRM ¶ 20.

[5] Id. ¶ 13.

[6] Id.

A. CALEA Does Not Apply To Information Services Provided By Telecommunications Carriers

CALEA plainly does not apply to information services provided by telecommunications carriers. The structure and specific provisions of the statute could not be clearer on this point.

CALEA's capability and capacity requirements apply only to "telecommunications carriers." The statute's definition of the term "telecommunications carriers" explicitly excludes from its scope any carrier operations or activities involving the provision of information services, i.e., a telecommunications carrier "does not include persons or entities insofar as they are engaged in providing information services."[7]

In addition to the fact that the statute does not use the term "exclusively" (rather using the words "insofar as"), interpreting the statutory limitation as applying only to entities that provide exclusively information services, as the Commission proposes, would render it superfluous. As a threshold matter, CALEA's capacity and capability obligations only affect certain categories of entities, i.e., telecommunications carriers.[8] None of these categories includes, in the first instance, entities that are providers exclusively of information services. To give any meaning to the phrase excluding "entities insofar as they are engaged in providing information services," the phrase must be construed as applying to

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[7] 47 U.S.C. § 1001(8)(C) (emphasis added).

[8] The CALEA definition requires that, to be considered a "telecommunications carrier" at all, an entity must be a "common carrier" (id. § 1001(8)), a commercial

carriers that fall within one of the specified categories and also provide information services. Under the plain terms of the limitation, such carriers are not subject to CALEA "insofar as" they are operating as providers of information services.[9]

If there were any doubt whether CALEA reaches information services (including voice mail) provided by telecommunications carriers, it is laid to rest by Section 103 of CALEA, which defines the capability requirements that telecommunications carriers are required to meet.[10] In a subsection entitled "Limitations," this provision explicitly states that the requirements imposed on telecommunications carriers to provide specified capabilities "do not apply to . . . information services."[11] The limitation is unqualified. Nothing in the statutory

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mobile radio service ("CMRS") provider, or a provider of a service that replaces a substantial portion of the local exchange (id. § 1008(B)(i)-(ii)).

[9] The Commission often applies regulatory requirements to particular activities of a carrier, while exempting the carrier from those same requirements when it is engaging in other activities. For example, the Commission noted in the Interconnection First Report and Order that an entity that provides both telecommunications and information services "is subject to the obligations under section 251(a), to the extent that it is acting as a telecommunications carrier," and therefore is not subject to those requirements when providing information services. See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd. 15499, 15990 ¶ 995 (1996), pets. for cert. pending. Similarly, in the instant NPRM, the Commission tentatively concludes (correctly) that "providers of pay telephones" (which can include entities that otherwise qualify as telecommunications carriers) "are not telecommunications carriers for purposes of CALEA." NPRM ¶ 16.

[10] 47 U.S.C. § 1002.

[11] Id. § 1002(b)(2)(A); see also H.R. Rep. No. 103-827, 103d Cong., 2d Sess., pt. 1, at 23 (1994) ("[T]he capability requirements only apply to those services or facilities that enable a subscriber to make, receive, or direct calls. They do not apply to information services . . . ."). U S WEST agrees that the inapplicability of CALEA's requirements to information services does not alter whatever other statutory duties a carrier may have "to provide law enforcement personnel with interceptions in

language suggests that the limitation applies only with respect to some subset of carriers or entities. Thus, any attempt to apply CALEA's requirements to information services provided by common carriers would be contrary to the statute.

B. Information Services Under CALEA Include All Services That Fall Within The Definition Of Information Services Under The 1996 Act, Including Enhanced Services

The Commission tentatively concludes that the 1996 Act did not modify CALEA's definition of the term "information services."[12] That conclusion, while correct, appears to overlook the more fundamental point that the two statutory definitions are virtually identical. Indeed, they differ only in that CALEA's definition enumerates more services in its definition of "information services" than does the 1996 Act. Accordingly, the term "information services" under CALEA includes at least all the services that constitute information services under the 1996 Act, and therefore includes those referred to as "enhanced services" before the 1996 Act was passed.

The basic definition of information services under both CALEA and the 1996 Act is the same: "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[13] The only significant difference between the definitions in

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response to a court order." NPRM ¶ 13 (citing 18 U.S.C. §§ 2510(12), 2516(2)). However, the duty to provide interceptions is distinct from the duties embodied in CALEA, which concern the design of a carrier's network.

[12] NPRM ¶ 15.

[13] 47 U.S.C. §§ 1001(6)(A), 3(20). Contrary to the suggestion in the NPRM (¶ 14), both statutory definitions specifically exclude capabilities relating to a carrier's

the 1996 Act and CALEA is that the former explicitly mentions only electronic publishing, while the latter includes not only that activity but also electronic messaging and services allowing customers "to retrieve stored information from, or file information for storage in, information storage facilities."[14] Obviously, CALEA's definition of information services encompasses at least all the services that fall within the definition in the 1996 Act.

Because all information services under the 1996 Act are information services under CALEA, the requirements of CALEA do not apply to any of the services that constituted "enhanced services" under 47 C.F.R. § 64.701(a). The Commission has confirmed that all services previously considered to be "enhanced services" are "information services" under the 1996 Act.[15] Accordingly, enhanced services are exempt from CALEA's requirements.

One of the enhanced services to which CALEA's information services exemption applies is voice mail. The Commission has already determined that

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"management, control, or operation" of a telecommunications network. 47 U.S.C. §§ 3(20), 1001(6)(C).

[14] Id. §§ 153(20), 1001(6)(B).

[15] See, e.g., In the Matter of Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services, First Report and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd. 5361, 5450 ¶ 210 (1997) ("Telemessaging Order"); In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 21905, 21955-56 ¶ 102 (1996) (1996 Act preserves definitional scheme under which Commission has previously exempted enhanced services from regulation).

voice mail is an enhanced -- and therefore an information -- service.[16] Indeed, voice mail falls squarely within one of the categories of information services explicitly enumerated in CALEA -- it is "a service that permits a customer to retrieve stored information from . . . information storage facilities."[17]

The conclusion that voice mail is exempt from CALEA's requirements is unaffected by the statement in the legislative history that the "call redirection portion of voice mail" is subject to CALEA.[18] The reference to the "call redirection portion of voice mail" merely refers to the redirection of an incoming call from a voice mail subscriber's access line to the subscriber's voice mailbox when he or she does not answer. This call redirection component is analogous to the function used in a wireless extension-type service, where a call is first sent to a subscriber's landline home telephone number and, if not answered there, is sent to a mobile telephone number. In each case, it is the telecommunications carrier's "redirection" of the call that is subject to CALEA.[19] The call redirection feature is functionally

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[16] See In the Matter of Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corporation, Memorandum Opinion and Order, 7 FCC Rcd. 1619 (1992), aff'd Georgia Public Service Comm'n v. FCC, 5 F.3d 1499 (11th Cir. 1993). Indeed, Section 260(c) of the 1996 Act expressly identifies voice mail as telemessaging, and the Commission has recognized that telemessaging is an information service. See Telemessaging Order, 12 FCC Rcd. 5450 ¶ 210.

[17] 47 U.S.C. § 1001(6)(B)(i).

[18] NPRM ¶ 20 (citing H.R. Rep. No. 103-827, 103d Cong., 2d Sess., pt. 1, at 21 (1994)).

[19] Applying CALEA's requirements to the call redirection component of the telecommunications activity would render the delivery of a message to a voice mailbox equivalent to the delivery of a message to an answering machine on the subscriber's premises. The message content and call-identifying information would be available in both cases, as the message is being delivered.

equivalent to call forwarding, which is a telecommunications service offered by telecommunications carriers[20] and is covered by CALEA.

This "redirection" activity stands in contrast to information and/or messages stored in a voice mailbox. There is no obligation that a telecommunications carrier make its voice mail enhanced services architecture subject to CALEA's requirements. In fact, the House Report itself is unequivocal that "[t]he storage of a message in a voice mail . . . 'box' is not covered by the bill."[21]

The Commission should unequivocally hold that "insofar" as telecommunications carriers provide information services, including enhanced services such as voice mail, those services are not subject to CALEA's requirements.

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[20] The call redirection portion of voice mail, like the other calling features mentioned in the NPRM and the House Report (call forwarding, call waiting, three-way calling, and speed dialing), is simply an adjunct to basic telephone service. See North American Telecommunications Assoc. Petition for Declaratory Ruling Under Section 64.702 of the Commission's Rules Regarding the Integration of Centrex, Enhanced Services, and Customer Premises Equipment, Memorandum Opinion and Order, 101 F.C.C. 2d 349 (1985), aff'd on recon., 3 FCC Rcd. 4385 (1988) ("NATA/Centrex Order"). Additionally, such adjunct to basic services are generally made available to any interested purchaser as Basic Service Elements ("BSE") under the Commission's ONA regime. In the Matter of Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), Report and Order, 104 FCC 2d 958 (1986) ("Phase I Order"), modified on recon., 2 FCC Rcd. 3035 (1987), ("Phase I Recon. Order"), on further recon., 3 FCC Rcd. 1135 (1988), Second further recon., 4 FCC Rcd. 5927 (1989), Phase I Order and Phase I Recon. Order, vacated sub nom. California v. FCC, 905 F.2d 1217 (9th Cir. 1990), Phase II Order, 2 FCC Rcd. 3072 (1987), modified on recon., 3 FCC Rcd. 1150 (1988), Phase II Further Recon. Order, 4 FCC Rcd. 5927 (1989), Phase II Order, vacated sub nom. California v. FCC, 905 F.2d 1217 (9th Cir. 1990); Computer III Remand Proceeding, 5 FCC Rcd. 7719 (1990), on recon., 7 FCC Rcd. 909 (1992), pets for review denied, sub nom. California v. FCC No. 90-70336, slip op. 9th Cir. Sep. 23, 1993, Report and Order, 6 FCC Rcd. 7571 (1991), vacated in part and remanded sub nom. People of State of Cal. v. FCC, 39 F.3d 919 (9th Cir. 1994), cert. denied, 115 S.Ct. 1427 (1995).

Such a holding is supported by the plain language of CALEA and the 1996 Act, the legislative history of CALEA and long-standing regulatory precedent.

III. THE COMMISSION SHOULD NOT PRESCRIBE RULES THAT MICROMANAGE CARRIER POLICIES AND PROCEDURES REGARDING CALEA-RELATED ACTIVITIES

A. Commission Mandates Affecting Internal Carrier Practices And Policies Should Be Kept To A Minimum

Pursuant to its obligation to "prescribe such rules as are necessary to implement" CALEA (language of Section 222(a)), and specifically Section 105 of CALEA (language of Section 229(b)), the Commission proposes certain rules[22] and requirements to be included in carriers' internal practices and policies. The proposals range from requirements that carriers include in their internal practices "statements"[23] reiterating existing statutory requirements,[24] to the fact that only certain personnel may participate in lawful interception activities,[25] as well as proposals requiring the recording of specific information, record retention and affidavits.[26]

The Commission's proposed rules are unduly detailed. They are not "necessary" for the Commission to meet its statutory obligations under Section 229.

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[21] H.R. Rep. No. 103-827 at 23.

[22] Proposed Section 64.1704.

[23] NPRM ¶¶ 29-30.

[24] Id. ¶ 29.

[25] Id. ¶ 30.

[26] Id. ¶¶ 30-33.

Nor are they needed for carriers to ensure compliance either with CALEA or Title 18.

As a matter of historical practice, many carriers (including most large carriers) have cooperatively participated with law enforcement to effectuate lawful electronic surveillance.[27] U S WEST would be surprised if, during that time, there have been any material breaches of individuals' expectations of confidentiality or violations of statutory mandates and obligations by those carriers with respect to law enforcement interceptions. Furthermore, as the Commission notes, both criminal and civil penalties are already associated with unlawful interceptions.[28] CALEA does not change those facts. Nor does it impose an obligation on the Commission to prescribe detailed elements for inclusion in internal carrier practices.

For purposes of Section 229, the Commission need not do much more than follow the literal language of the statute (as it has in other statutory implementation contexts).[29] A rule along the following lines would be sufficient for the Commission to meet its statutory obligations.

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[27] For decades before divestiture, AT&T Corp. ("AT&T") maintained renowned "black binders" outlining practices and procedures for almost every aspect of its Bell Operating Companies ("BOC") business practices, including relationships with law enforcement. The legacy of the AT&T black binders resulted in the post-divestiture BOCs having established formal internal practices and procedures in place regarding interactions between the BOCs and law enforcement. There is no suggestion that these practices were vacated upon divestiture. If anything, they probably have become more precisely crafted to reflect specific company operations.

[28] NPRM ¶¶ 27, 32.

[29] See, e.g., In the Matter of Policies and Rules Governing Interstate Pay-Per-Call and Other Information Services Pursuant to the Telecommunications Act of 1996,

- Carriers shall establish and maintain appropriate policies for the supervision and control of their officers and employees (Section 229(b)(1)), which include

  ⇒ provisions to assure that employees involved in interceptions are authorized to do so (Section 229(b)(1)(A)),

  ⇒ and to prevent any interceptions or access without such authorization (Section 229(b)(1)(B)).

- Carriers shall maintain secure and accurate records of any interceptions (Section 229(b)(2)); and

- Carriers shall submit policies and procedures for review (Section 229(c)), unless they meet certain criteria established by Commission Guidelines -- an alternative review mechanism that would meet the statutory objective.

Given the long-standing tradition of carrier-law enforcement cooperation and the limited allegations of inappropriate conduct, there is simply no compelling regulatory or business need for detailed Commission rules or prescriptions around the matter of carrier cooperation with law enforcement in effectuating lawful electronic surveillance. Absent either, there would be no public interest goal accomplished by such a prescription.

Rather than proceed with the type of proposals included in the NPRM, the Commission should promulgate rules that offer incentives to carriers to craft

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Order, 11 FCC Rcd. 14738, 14743 n.27 ("The rules we adopt herein differ from the statutory language in only a few instances in which we have altered parts of speech or included introductory phrases to conform to the structure of our existing regulations."). In the Matter of Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers, Further Notice of Proposed Rule Making and Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd. 10674, 10682-683 ¶ 12 ("to incorporate the specific language of Section 258(a) of the Act into Part 64 of our rules to reflect the statutory prohibition of slamming by any telecommunications carrier . . .").

practices and policies that meet those envisioned by the Commission as ideal. As discussed more fully below, the existence or absence of such elements in a carrier's internal practices/policies should form the basis for any obligation to formally submit the practices/policies for Commission review.

B. U S WEST Currently Has More Than Adequate Practices And Policies

For more than a quarter of a century, U S WEST's Security Department has maintained internal procedures and policies to assure that its Court Order Processing Center ("Court Order Work Group" or "Work Group") effectuates only lawful interceptions and effectively supervises the implementation of lawful interceptions.[30] As important and impressive as the long-standing dedication of employees to the matters of law enforcement security matters is the fact that, to the best of U S WEST's knowledge, our Security Department **has never effectuated an unlawful interception; nor has the Work Group ever compromised the confidentiality of a lawful interception.**

The Work Group's exceptional record during that time is the result of careful and strict adherence to the Work Group's internal policies and procedures, broader corporate policies which incorporate the requirements of Title III, the Pen Register

[30] As mentioned above, U S WEST's practices are the legacy of the AT&T's Bell System methods and procedures. See note 27, supra. Since divestiture, U S WEST Communications, Inc. ("USWC") has modified those practices only to make them conform better to our own corporate organization. U S WEST's Media Group, a new entrant in the area of telephony, is in the process of creating its own internal practices and procedures regarding law enforcement interceptions. During this process, they are working in close consultation with USWC personnel. Additionally, the Media Group has contracted with USWC's Work Group to provide appropriate law enforcement assistance until that Group creates its own organization.

Statute, the Electronic Communications Privacy Act ("ECPA"), CALEA, and the 1996 Act. Against this type of history, factual context and prudent corporate self-management, the Commission's detailed proposals regarding internal carrier practices and policies are overreaching.

U S WEST, like other carriers, should be permitted to craft tailored internal practices and policies regarding cooperation with law enforcement. Should the Commission desire to promulgate Guidelines around matters that it believes should be incorporated into carrier practices, it should do so.[31] But, adherence to the Guidelines should not be required. Rather, such adherence should simply provide the foundation for streamlined review of a carrier's internal practices and procedures.

Because the Commission might well include some of the specific items it outlined in the NPRM as appropriate elements to be included in Guidelines, U S WEST addresses some of the specific proposals below.

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[31] For example, the Commission has crafted regulatory regimes around a "Guidelines-approach" in the area of area code relief (In the Matter of Proposed 708 Relief Plan and 630 Numbering Plan Area Code by Ameritech - Illinois, Declaratory Ruling and Order, 10 FCC Rcd. 4596 (1995); In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Second Report and Order and Memorandum Opinion and Order, 11 FCC Rcd. 19392, 19508-541 ¶¶ 261-343 (1996)) and, to a certain extent, the implementation of local number portability (In the Matter of Telephone Number Portability, Second Report and Order, 12 FCC Rcd. 12281 (1997)). The Guidelines are meant to operate as a type of road map to drive toward reasoned carrier and regulatory actions.

While U S WEST has taken issue with certain of the specifics of the Commission's numbering analyses and decisions, the "Guidelines approach" is not a matter we have challenged.

C. Comment On Certain Of The Commission's Tentative Conclusions

As indicated above, U S WEST does not support the type of detailed rules proposed in the NPRM. Below, we discuss certain of the Commission's specific proposals. We indicate areas of general agreement and disagreement with the proposals. We also address why, even if we agree with a Commission proposal as a matter of substantive interpretation, we do not believe it need be incorporated into a formal Commission rule.

1. The Meaning Of "Appropriate Authorization" In Section 229(b)(1)(A) And (B)

The Commission tentatively concludes that the term "appropriate authorization" as used in Section 229(b)(1)(A) and (B) refers to the "authorization that a carrier's employee needs from the carrier to engage in interception activity,"[32] rather than the type of substantive authorization required by law to engage in a lawful interception. U S WEST agrees with the Commission's tentative conclusion.

Still, we do not believe that the Commission need do anything by way of rule promulgation in this area, other than to confirm its interpretation of the meaning of the phrase "appropriate authorization" and require carriers to promulgate practices and policies that incorporate the statutory requirements found in Section 229(b)(1)(A) and (B). Many carriers undoubtedly already include in their practices/policies elements to ensure appropriate authorization, as interpreted by the Commission.

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[32] NPRM ¶ 25. The Commission is driven to this conclusion by the fact that 47 U.S.C. § 229(b)(1) generally deals with "appropriate policies and procedures for the supervision [of the carrier's own] employees."

For example, U S WEST strictly controls the authority it delegates to employees who assist law enforcement agencies with implementation of electronic surveillance. Today, U S WEST's Security Department's policies and procedures require that the managing employees of the Work Group (i.e., the supervisor, manager, director and in-house support lawyer) undergo a National Security Clearance conducted by the FBI. While the primary purpose of the security clearance and background check is to ensure that individuals in those positions are capable of providing Foreign Intelligence Surveillance Act ("FISA") assistance, U S WEST relies on the clearance as an additional factor to ensure that those employees possess trustworthy and loyal character traits.[33] These managers, then, have direct supervisory responsibility over those individuals who effectuate lawful interceptions, including responsibility for hiring and retention of those employees.

2. The Need For Substantive Rules On Interceptions

Having concluded that the phrase "appropriate authorization" in Section 299(b)(1) refers to internal business structure and the authorization process,[34] the Commission goes on to address something it refers to as "Legal Authority."[35] In that section of the NPRM discussion, the Commission tentatively concludes that because Section 105 of CALEA imposes a duty on each carrier to ensure that only lawful

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[33] See Letter to Mr. Kent Nilsson, Deputy Chief, Network Services Division, from Ms. Rozanne R. Worrell, Supervisory Special Agent, Telecommunications Industry Liaison Unit, FBI, dated Dec. 17, 1996 ("Worrell Letter") ("A telecommunications carrier should be responsible for ensuring that its authorized personnel are trustworthy"), cited at NPRM ¶ 27 n.100.

[34] In the NPRM, this area is discussed under "Carrier Security Policy," id. ¶¶ 25-27.

[35] Id. ¶¶ 28-29.

interceptions occur on the carrier's premises and that unlawful interceptions are a violation of that duty,[36] the Commission should prescribe rules around the matter of "lawful" versus "unlawful" interceptions. U S WEST disagrees with the Commission's tentative conclusion and approach in this area.

What constitutes a lawful versus an unlawful interception is already a matter of statutory mandate. Indeed, as the Commission acknowledges, the fundamental mandates in this area, while referenced in CALEA,[37] are found outside the statutory provisions of CALEA in Title 18.[38] No useful purpose is served by mandating internal carrier practices/policies specifically to "state . . . that carrier personnel must receive a court order or, under certain exigent circumstances, an order from a specially designated investigative or law enforcement officer, before assisting law enforcement officials in implementing electronic surveillance."[39]

While most carrier practices/policies undoubtedly currently do describe for their employees what constitutes lawful versus unlawful requests for surveillance and train them on such matters[40] (which may, in fact, go beyond those requirements

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[36] Id. ¶ 26.

[37] 47 U.S.C. § 1004.

[38] NPRM n.21, ¶¶ 28-29 and nn.102, 104. Title III (the Pen Register Statute), and the ECPA similarly require that carriers only effectuate lawful interceptions.

[39] Id. ¶ 29.

[40] At U S WEST, for example, the Company's Security Department's policies and procedures, as well as the Company's corporate policies, require a court order or exigent circumstances before the Company implements electronic surveillance. In a written guide published by U S WEST and made available to law enforcement agencies, U S WEST summarizes our policies and procedures for electronic surveillance. See also pp. 31-32 infra.

strictly mandated by "law"),[41] the fact remains that those requirements are statutory and constitutional based. They do not rely on Commission rule, or their existence in a carrier's internal practices or procedures to make them true or effective. Furthermore, they are subject to some modicum of change. Indeed, for that reason, listing or identifying the specifics of any element (i.e., the "exigent circumstances" element, for example) would not necessarily be prudent.[42]

Like other matters which the Commission tentatively concludes might be appropriately included in internal carrier practices/policies, the Commission should relegate this matter (i.e., the mandate of a "statement") to a "guideline" or "safe harbor" approach associated with streamlined Commission review (see further discussion below). It should not mandate the inclusion of this material in a carrier

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The U S WEST Security Department specifically delegates implementation of electronic surveillance to the Court Order Work Group. The Department charges the Work Group with the responsibility of implementing in good faith only those interceptions that are lawfully authorized by a judge. The Work Group coordinates with law enforcement agencies and internal employee constituents to ensure that only lawful court orders result in interceptions and the contents are delivered only to the requesting law enforcement agency. The Work Group monitors the entire process from receipt of a court order to installation and expiration.

[41] For example, in addition to training our employees on their statutory duties of care, U S WEST also considers any unlawful interceptions arising out of security systems to be a violation of the Security Department policies and procedures, as well as our corporate policy governing the conduct of our Security employees.

[42] In an earlier edition of the Guide (referenced above in note 40 and p. 32), U S WEST enumerated the exigent circumstances prescribed by law. Law enforcement requested that U S WEST remove the list, indicating that they would inform U S WEST when a incident constituted an exigent circumstance. While U S WEST worked with law enforcement to delete the list in the Guide, U S WEST continues to identify those exigent circumstances identified in the statute in our Security Department Court Order Processing Center's policies and procedures, to increase employee awareness and aid individuals in their daily work activities.

policy/practice as a matter of substantive compliance with Section 229 or promulgated Commission rules.

However, should the Commission ultimately determine to include a substantive rule on the predicate foundation for a lawful interception, it should go beyond its basic proposal that such foundation be included in carrier practices. It should also affirmatively declare that a carrier who responds to a facially valid court order or a request from law enforcement citing to exigent circumstances would be acting reasonably and lawfully under the carrier's practices and Commission rules. Reliance on such facially valid documents should preclude any future carrier criminal or civil liability.[43]

3. Designated Versus Non-Designated Employees Involved In Interceptions

a. Designated Employees

The Commission proposes requiring carriers -- as a part of their "appropriate policies and procedures for the supervision and control of [their] officers and employees" (the language of Section 229(b)(1)) -- to designate specific employees, officers, or both to assist law enforcement officials in implementing lawful interceptions and to include a "statement that only designated employees or officers may participate in lawful interception[s]."[44] It also inquires whether it should require carriers to create and maintain an "official list" of all personnel designated by the carriers to effectuate lawful interceptions and whether carriers should be

[43] Compare 18 U.S.C. § 2520(d).

[44] NPRM ¶ 30.